SCOTT HARSHBARGER
ATTORNEY GENERAL

The Commonwealth of Massachusetts
Office of the Attorney General
131 Tremont Street
Boston, MA 02111

February 16, 1995

William Canton, Acting Secretary,
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Cellular Telecommunications Industry Association's ("CTIA") Petition for Rulemaking, RM-8577

Dear Mr. Canton:

On December 22, 1994, CTIA, pursuant to the rules of the Federal Communications Commission ("FCC"), submitted a petition for a rulemaking requesting that the FCC issue a notice of proposed rulemaking to preempt state and local governments from enforcing zoning and similar regulations effecting the siting of new towers of commercial mobile radio service ("CMRS") providers. On January 18, 1995, the FCC issued a public notice requesting comments on the petition within 30 days of the date of the notice. By these comments, the Attorney General of the Commonwealth of Massachusetts ("Massachusetts Attorney General") addresses CTIA's petition and sets forth the basis for the position of the Commonwealth that the CTIA Petition should be denied.

CTIA'S PETITION

In its petition, CTIA asserts two bases for its request. First, it argues that a 1993 amendment to the Communications Act supports Federal preemption of tower siting by the states. *CTIA petition*, pp. 3-10. In particular, CTIA asserts that through its enactment of amendments codified at 47 U.S.C.A. § 332(c)(3)(A), "Congress intended that the principles of competition, efficiency and regulatory parity outweigh the state's interest in zoning and other regulation." *Id.* p. 7. Second, CTIA asserts that notwithstanding the extent of any authority reserved to the states under Section 332, the FCC retains authority to preempt state and local regulations that render impossible the legitimate exercise of its own express authority. *Id.* pp. 10-13. Thus, CTIA argues that because "state regulations ... [may] physically delay or prevent the siting and build out

of CMRS towers[,] ... they should be preempted" because they ... directly impinge upon interstate communications as well as Congress' decision favoring a competitive, efficient wireless infrastructure subject to uniform, federal regulation." *Id.* p. 13.

ARGUMENT

CTIA's assertions are without merit. The law concerning the circumstances in which a federal administrative agency may act to preempt state law is very clear and those circumstances are very narrow. "[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-375 (1986) ("Louisiana") (FCC without authority to preempt state regulation of dual jurisdiction property depreciation rates used in establishing intrastate service rates for intrastate ratemaking purposes). "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation would be to grant to the agency power to override Congress." *Id.* As the D.C. Circuit explained with specific reference to the Communications Act, "The Act creates a dual regulatory system, allocating jurisdiction between federal and state authorities, which the FCC may not subvert by inflating its authority under section 220 and 151 at the expense of the states' authority under section 152(b)." *People of the State of California v. FCC,* 798 F.2d 1515, 1519 (D.C. Cir. 1986) (Section 152(b) does not give FCC authority to preempt state regulation of purely intrastate radio common carrier services provided on FM subcarrier frequencies, although state regulation could frustrate entry of FCC licensees). *Cf. California State Board of Optometry v. F.T.C.*, 910 F.2d 976, 982 (D.C.Cir. 1990)("An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.")

It should be clear that the language relied upon by the CTIA does not confer authority upon the FCC to preempt state laws concerning zoning and other "siting" matters. The extent of the FCC's preemptive authority under Section 332 is clear and that authority extends only to the regulation of rates and entry:

> notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating other terms and conditions of commercial mobile services.

47 U.S.C.A. § 332(c)(3)(A). Notwithstanding CTIA's attempt to suggest that "Congress intended that the principles of competition, efficiency and regulatory parity outweigh the state's interest in zoning and other regulation," it is plain that Congress did not intend by this language to confer authority upon the FCC to preempt state and local laws governing zoning and/or facilities siting. Indeed, as even CTIA recognizes, *see CTIA Petition*, p. 7, n. 16, although Congress did not define the term "entry" as it is used in Section 332, the legislative history of this section is plain that "facilities siting issues (*e.g.*, zoning)" were considered to be within the ambit

of the "terms and conditions" that Congress intended would remain within the States' purview. *See* H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260, at 261 (1993).

Moreover, with regard to CTIA's attempt to cast its request as falling within the so-called "impossibility exception" recognized in *Louisiana*, *CTIA Petition*, pp. 10-13, it should be equally clear that that exception does not apply here. First, CTIA fails to even allege that state and local zoning and other facilities siting laws would render impossible or otherwise negate the accomplishment of valid FCC regulatory goals. All it asserts is that such laws may "impinge upon" interstate communications. *CTIA Petition*, p. 13. The law, however, is clear that the impossibility exception can be relied upon to support preemptive actions by the FCC only where it carries the burden of showing that the exercise of authority otherwise reserved to the states would result in such a frustration of Congressional objectives. *People of the State of California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994). Second, the plain truth is that the exercise of authority over the siting/location of CMRS towers by states and local governments is not in any way inimical to the Congressional goal of an efficient competitive market in wireless services.

CONCLUSION

For the above reasons, the Massachusetts Attorney General urges the FCC to deny CTIA's petition and to not initiate a rulemaking proceeding in this matter.

Respectfully submitted:

George B. Dean
Frank P. Pozniak
Assistant Attorneys General
Regulated Industries Division
Public Protection Bureau
(617) 727-2200